No. 126, Original

In The
Supreme Court of the United States

STATE OF KANSAS,

Plaintiff,

v.

STATE OF NEBRASKA

and

STATE OF COLORADO,

Defendants.

ON MOTION FOR LEAVE TO FILE

KANSAS' REPLY

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STATEMENT

Kansas filed its Motion for Leave to File Petition, Petition and Brief in Support ("Kansas' Second Motion for Leave" or "Kan. Br.") in May 2010. In July 2010, Nebraska filed its Brief of the State of Nebraska in Response to Kansas' Motion for Leave to File Petition ("Nebraska Brief" or "Neb. Br."). At the same time, Colorado filed the State of Colorado's Response to the State of Kansas' Motion for Leave to File Petition ("Colorado Brief" or "Colo. Br.").

The instant dispute has a long history. Kansas complained for many years in the forum of the Republican River Compact Administration ("RRCA") that Nebraska's groundwater pumping was causing violations of the Republican River Compact ("Compact"). See Second Report of the Special Master (Subject: Final Settlement Stipulation) 36 (2003), *Kansas v. Nebraska & Colorado*, No. 126, Orig. ("As early as the RRCA's 1985 meeting, the Kansas member of the RRCA moved that the Engineering Committee 'review methods of computing virgin water supply and consumptive use with special attention to ground water depletions including the impact of pumping the Ogallala Aquifer'"). Kansas also pursued negotiations and mediation of the dispute, to no avail. *Id.*, at 18.

In May 1998, Kansas filed in this Court its Motion for Leave to File Bill of Complaint, Bill of Complaint, and Brief in Support of Motion for Leave to File Bill of Complaint, seeking enforcement of the Compact against Nebraska. At the invitation of the

Court, the United States filed a Brief as *amicus curiae* recommending that the Court grant Kansas' motion. Brief for the United States as *Amicus Curiae* on Motion for Leave to File Bill of Complaint (Dec. 1998), *Kansas v. Nebraska & Colorado*, No. 126, Orig. The Court granted Kansas' motion. *Kansas v. Nebraska & Colorado*, 525 U.S. 1101 (1999). The primary cause of the alleged violation of the Compact was groundwater pumping in Nebraska. Nebraska denied that effects of groundwater pumping on the Republican River needed to be accounted for under the Compact, but the Court's Special Master ruled otherwise. First Report of the Special Master (Subject: Nebraska's Motion to Dismiss) 1, 44-45 (2000), *Kansas v. Nebraska & Colorado*, No. 126, Orig. ("The Republican River Compact restricts a compacting State's consumption of groundwater to the extent the consumption depletes stream flow in the Republican River Basin and, therefore, Nebraska's Motion to Dismiss should be denied"). Based on Special Master McKusick's recommendation, the Court denied Nebraska's Motion to Dismiss. *Kansas v. Nebraska & Colorado*, 530 U.S. 1272 (2000).

After the Court's denial of Nebraska's Motion to Dismiss, and subsequent rulings by Special Master McKusick, the States entered into settlement negotiations, which resulted in the Final Settlement Stipulation ("FSS"). The FSS, in turn, was approved by the Court in its Decree of May 19, 2003 ("Decree"). *Kansas v. Nebraska & Colorado*, 538 U.S. 720 (2003), reprinted in Kan. Br., at B1. Under the FSS, Kansas

waived its damages claims for Compact violations prior to December 15, 2002. FSS, § I.C, reprinted in Kan. Br., at B3, B8.

SUMMARY OF ARGUMENT

All three States subject to the Republican River Compact have upstream compliance responsibilities. Kansas is in part upstream of Nebraska. Nebraska is in part upstream of Kansas. Colorado is upstream of both other States. Kansas has maintained compliance with the Compact and the Court's Decree enforcing the Compact. Nebraska, by its own admission, has not.

Nebraska disputes the amount of its violation and the retrospective and prospective remedies proposed by Kansas. Nebraska also makes bold assertions about its latest actions to ensure future compliance, but these statements are contrary to recent statements of the U.S. Bureau of Reclamation. These are disputes that cannot be resolved except in the forum of this Court's original jurisdiction. The Court's specific criteria for exercise of that jurisdiction have been met, not least by the fact that the Court has already exercised jurisdiction in this case. The Nebraska Brief only reinforces Kansas' position that there is a serious problem regarding compliance with the Court's Decree in the Republican River

Basin. The Court should grant Kansas leave to file its Petition so that the Court's Decree can be enforced.

ARGUMENT

I. Neither Nebraska Nor Colorado Requests Denial of the Motion for Leave

Nebraska does not deny that it violated the Decree of the Court. Rather, Nebraska takes issue only with the amount of the violation, suggesting that it might be half of the total acre-feet indicated by Kansas as being Nebraska's position. Neb. Br. 19.[1] In fact, Nebraska encourages the Court to take the case, provided that Nebraska's and Colorado's defensive issues are included. *Id.*, at 18 ("Nebraska submits the Court should grant Kansas' motion, but for the purposes of addressing *all* issues presented to Arbitrator Dreher below and currently before Arbitrator Pagel" (emphasis Nebraska's)). While Nebraska is correct that Kansas' Motion for Leave should be granted, it is by no means clear that Nebraska's additional issues are proper subjects for the Court's consideration. The propriety of including Nebraska's additional issues would normally be resolved at a

[1] This position is inconsistent with the position Nebraska took in the arbitration of this issue, where Nebraska's experts quantified the total overuse in 2005 and 2006 as being 71,475 acre-feet. See Nebraska Arbitration Exh. 8, Table 2-2, at 5 ("Nebraska's Compliance During Water-Short Year Administration, RRCA Accounting Procedures Table 5C" showing a total overuse for 2005 and 2006 of 71,475 acre-feet).

later pleading stage of the case, if the Motion is granted.

Colorado takes no position on Kansas' Motion. Colo. Br. 8.

II. Nebraska's Factual Assertions, Though Premature, Provide Further Support for Kansas' Motion

A. Nebraska's Factual Assertions Are Premature

Nebraska asks the Court to accept its view of disputed facts as a basis for challenging the sufficiency of Kansas' Motion for Leave to File. See generally Neb. Br. 19-23. But the Court has traditionally allowed for full development of the record before making its determination of the nature and scope of obligations between sovereigns in the exercise of its original jurisdiction. See, *e.g.*, *United States v. Texas*, 339 U.S. 707, 715 (1950). Thus, the Court should resist Nebraska's premature invitation to decide the relative strength of the evidence at this stage.

The purpose of the Motion for Leave is to determine whether Kansas should be given a chance to prove that a violation of the Decree occurred. The Court's decision in *Nebraska v. Wyoming,* 515 U.S. 1 (1995) is illustrative. In that case, the Court rejected the State of Wyoming's factually based objections in determining whether Nebraska would be allowed to enlarge the scope of its claims against Wyoming in a pending interstate water case, stating: "at this stage

we certainly have no basis for judging Nebraska's proof, and no justification for denying Nebraska the chance to prove what it can." *Id.*, at 13; see also *Kansas v. Colorado*, 185 U.S. 125, 147 (1902) (overruling demurrer to the bill of complaint on the grounds that Kansas should be allowed to discover facts necessary to prove its case). In sum, the existence of disputed facts is simply an additional reason that the Court should grant Kansas' Motion so that proper trial of such facts can be conducted with the assistance of a Special Master. Cf. *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 28 (1951) ("A State cannot be its own ultimate judge in a controversy with a sister State").

B. Nebraska's Assertions Illustrate the Need for the Court's Intervention

Nebraska includes as part of its Brief a table showing Nebraska's Allocations, Computed Beneficial Consumptive Use, Imported Water Supply Credit and the measure of Compact compliance (allocation – (CBCU – IWS Credit)). See Neb. Br., at App. 21. Nebraska indicates that Nebraska's 2009 consumption of water ("Computed Beneficial Consumptive Use" or "CBCU") has increased beyond any level reported in the table for previous years. According to Nebraska, its 2009 consumption is 288,200 acre-feet. Although Kansas has not had an opportunity to determine whether it agrees with these figures, Nebraska's figures show that from 2008 to 2009, Nebraska's consumptive use increased by some 15%. Meanwhile, the

same table shows that Nebraska's allocation under the Decree decreased from 2008 to 2009 by some 12%. This table also shows the existence of an additional Compact violation under the five-year test for the years 2003-2007, with an average annual overuse of 20,532 acre-feet per year, as quantified by Nebraska. These are all indications of a serious problem that has not been remedied, and, in fact, is getting worse. Moreover, these latest results are consistent with the continuing increase in depletions by Nebraska groundwater pumping shown on Figure 7, page C20 of Kansas' Second Motion for Leave.

Kansas disagrees with many of the factual allegations made by Nebraska in the Nebraska Brief. The current stage of the proceeding is not the time to resolve such facts, however, as explained above. Nevertheless, Kansas expressly denies the Nebraska Brief's factual allegations. Kansas will limit itself to a discussion of a few of Nebraska's allegations, as examples of why the Court should not rely on them.

At the outset of its Brief, Nebraska refers to "Kansas' persistent efforts to prevent an accurate accounting of Republican River waters." Neb. Br. 1. Nebraska is apparently referring to Kansas' opposition to Nebraska's proposal to change the Compact accounting approved in the Decree. See *id.*, at 24-25. This is the very accounting that has shown Nebraska to be in violation of the Decree. It is not a viable response to a claim of violation to propose that the standard violated should be changed. The accounting

complained of by Nebraska was duly agreed to by Nebraska and the other States and approved by the Court. It is particularly inaccurate for Nebraska to describe Kansas' opposition as "persistent efforts to prevent an accurate accounting." Further, what Nebraska refers to as an "error" is not considered an error by Kansas, nor did the Arbitrator find any such "error." See Neb. Br., at App. 83 App. 84, ¶¶ 2-5 (Arbitrator's Conclusions).[2]

Nebraska makes much of its efforts to remedy its violations of the Decree in an attempt to downplay the seriousness and dignity of Kansas' claim. See Neb. Br. 3-7. For example, Nebraska relies on its Integrated Management Plans ("IMPs" or "Plans") to assert that Kansas' requests for prospective relief are nonjusticiable. Neb. Br. 5-7, 14-15, 20-23. The IMPs are plans purportedly developed by Nebraska as a remedy for its violations of the Decree. See, *id.*, at 3-7. The first IMPs became effective in 2005 and were revised in 2007 and 2008. *Id.*, at 5-6. The IMPs are again under revision. *Id.*, at 22-23. Nebraska's continual revision of the IMPs is an implicit admission that the IMPs have not been sufficient to ensure Nebraska's compliance with the Compact. As Nebraska

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[2] The Appendix to the Nebraska Brief contains excerpts of the uncorrected Arbitrator's Final Decision. The complete Arbitrator's Final Decision, as corrected by the Arbitrator, is available at http://www.ksda.gov/includes/document_center/interstate_water_issues/RRC_Docs/FinalArbitrationDecision.pdf.

admits, it used more than its Compact allocation in 2005 and 2006 despite the IMPs. See Neb. Br. 19, Fig. 3, at App. 21. Kansas' Motion for Leave is based on this violation.

Nebraska now asserts that it is developing new "third generation" IMPs. *Id.*, at 22-23. Throughout Nebraska's drafting and redrafting of the IMPs, the United States Bureau of Reclamation has provided comments on the drafts, stating most recently, *e.g.*, that the currently proposed "third-generation" IMP for the Upper Republican Natural Resource District ("Upper Republican NRD") "is inadequate." U.S. Bureau of Reclamation Statement Re Proposed IMP For Nebraska's Upper Republican NRD, June 10, 2010, reprinted as the Appendix to this Brief, at A1.

Nebraska also points to its claimed retirement of irrigated acreage. Neb. Br. 6-7. This claim is misleading at best given the fact that irrigated acreage in the basin in Nebraska has actually increased since the FSS was signed in late 2002. See Kan. Br., App. C to Petition, Fig. 5, at C18.

Given the demonstrated inadequacy of Nebraska's IMPs and other actions it has taken, Nebraska's allegations do not undermine Kansas' claim, but instead serve to reinforce the seriousness and dignity of that claim, providing further support for the granting of Kansas' Motion for Leave.

III. The Court's Criteria for Exercise of Jurisdiction Are Met

The Court's consideration of whether to exercise its original jurisdiction in any case depends on two criteria. First, the Court considers the nature of the complaining State's interest, with a focus on the seriousness and dignity of the claim. *Mississippi v. Louisiana*, 506 U.S. 73, 77 (1992). Second, the Court considers the availability of an alternative forum. *Ibid.*; see also *South Carolina v. North Carolina*, 130 S. Ct. 854, 869 (2010). As demonstrated in Kansas' Second Motion for Leave, Kansas' claim that Nebraska violated this Court's decree meets this test. See Kan. Br., Brief in Support 13-24.

A. Kansas' Claim Is Serious, Dignified and Justiciable

Kansas has previously explained the seriousness and dignity of its claim. *Id.*, at 19-24. Simply put, Kansas is claiming the violation of a decree of the Court. It is also claiming the violation of a compact approved by Congress. In claiming that Nebraska is depriving Kansas of its lawful share of the water of an interstate stream, Kansas asserts a substantial sovereign interest that falls squarely within the traditional scope of this Court's original jurisdiction. See, *e.g.*, *Texas v. New Mexico*, 462 U.S. 554, 567 (1983); *Arizona v. California*, 373 U.S. 546 (1963); *Nebraska v. Wyoming*, 325 U.S. 546 (1945); *Wyoming v. Colorado*, 298 U.S. 573 (1936); *Kansas v. Colorado*, 185 U.S. 125 (1902).

Nebraska asserts that Kansas' claim, standing alone, does not merit exercise of this Court's jurisdiction because, in part, "Kansas' damage claim is *de minimis*." Neb. Br. 20. However, in an interstate suit seeking enforcement of an established apportionment of interstate water, injury need not be pled at all. See *Nebraska v. Wyoming*, 507 U.S. 584, 592 (1993) ("In an enforcement action, the plaintiff need not show injury"); Second Report of the Special Master (Subject: Final Settlement Stipulation), at D1-19, *Kansas v. Nebraska & Colorado*, No. 126, Orig. (2003). A similar claim was rejected by this Court in *Wyoming v. Colorado*, 309 U.S. 572 (1940). In that case, Wyoming sought relief for violation of the Court's decree, which had apportioned an interstate stream by limiting withdrawals in Colorado. *Id.*, at 573. After Wyoming was granted leave to file its petition, *id.*, at 574, the Court rejected Colorado's defense that Wyoming had not been injured, explaining that the Court's decree had "fixed the amount of water" to which each state was entitled. *Id.*, at 581. Nebraska in this case, like Colorado in *Wyoming v. Colorado*,

> "is bound by the decree not to permit a greater withdrawal and if she does so, she violates the decree and is not entitled to raise any question as to injury to [Kansas] when [Kansas] insists upon her adjudicated rights. If nothing further were shown, it would be [the Court's] duty to grant the petition of [Kansas] and to adjudge [Nebraska] in contempt of her violation of the decree." *Ibid.*

Thus, Nebraska's unsupported assertion that Kansas' damages are *de minimis* has no bearing on whether the Court should grant Kansas' Motion for Leave.

The foregoing notwithstanding, Kansas rejects the notion that its damages are *de minimis*. Nebraska admits that its average overuse in the two years 2005 and 2006 was some 35,000 acre-feet per year. To give some perspective, the Supreme Court Courtroom has a volume of 3⅓ acre-feet. Nebraska's admitted overuse thus represents some 10,000 volumes of the Courtroom per year. Further comparisons showing the magnitude of Nebraska's violation were included in Kansas' Second Motion for Leave. See Kan. Br., Brief in Support 15, 21-22; *id.*, Petition, ¶ 20, at 10 ("Nebraska's violation is more than the annual consumptive use of a city of a half million people").

Finally, Nebraska asserts that Kansas' claim is not justiciable, being either moot or unripe. Neb. Br. 21-22. The basis for Nebraska's argument is that the particular version of the IMPs, which are asserted as a defense by Nebraska, has changed. Yet the justiciability of Kansas' claim and whether it satisfies the Court's criteria can hardly depend upon which version of the IMPs might be current at any given time. Kansas' claim is not based on Nebraska's IMPs. Nebraska's argument confuses the question of a past violation with the question of a future remedy. Issues regarding the adequacy of Nebraska's current and future IMPs to ensure future compliance may be relevant to the determination of the proper remedy

for Nebraska's violation. However, that determination can only be made in the context of the case itself, after the Court has made the threshold determination of whether there is a cognizable claim that is properly before it.

B. Further Prefiling Dispute Resolution Is Not Required

The Decree and underlying FSS require a party to follow a certain process before bringing a dispute before this Court. A dispute must first be submitted to the RRCA. FSS, § VII.A.1, reprinted in Kan. Br., App. B to Petition, at B48. If the RRCA is unable to resolve the dispute, the FSS requires the parties to submit to non-binding arbitration. *Id.*, § VII.A.7. A party is deemed to have exhausted its administrative remedies with regard to any disputed issue that has been submitted to the RRCA and to arbitration. *Id.*, § VII.A.8. Kansas has submitted to the RRCA and to arbitration all of the issues raised in its Motion. Kan. Br., Brief in Support 12; Neb. Br. 10; Colo. Br. 5-6. Kansas has therefore exhausted its administrative remedies, and no forum other than the Court's original jurisdiction remains. Colorado recognizes that Kansas has complied with the dispute resolution requirements of the FSS: "the dispute resolution process is no longer an available forum to resolve these issues." Colo. Br. 8. No further prefiling dispute resolution is required.

CONCLUSION

Kansas' Motion for Leave to File Petition should be granted.

Respectfully submitted,

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APPENDIX

Statement of the Bureau of Reclamation
Nebraska-Kansas Area Office
Aaron M. Thompson, Area Manager

Regarding Proposed Integrated Management Plan for the Upper Republican Natural Resources District

June 10, 2010

INTRODUCTION

The Bureau of Reclamation (Reclamation) recognizes the appropriate role of the State of Nebraska to establish and enforce water policy. The current State water policy of developing and implementing Integrated Management Plans (IMP) is a step in the right direction. However, Reclamation is concerned that the IMP proposed by the State and the Upper Republican Natural Resource District (URNRD) is inadequate. It fails to protect Reclamation's senior water rights from direct and substantial groundwater development of the hydrologically connected waters of the Republican River Basin (Basin) that occurred following approval of the Compact and subsequent investment of infrastructure.

Reclamation contends the State water policy that has evolved following approval of the Republican River Compact (Compact) ignores the physical reality of the hydrological connection between surface and groundwater sources. The policy separation between surface and ground water has lead to an overdevelopment of the finite water resource in the Republican River

Basin. As a result, the investment of the United States in the development of infrastructure is in jeopardy. The irrigation, recreation, and fish and wildlife benefits are currently below their potential as envisioned and authorized by Congress. The taxpayers of the United States have an expectation that their investment will be protected, which includes water rights held by the United States.

Reclamation offers to assist both the State and URNRD in developing a long term solution to the issue of Compact compliance that recognizes the hydrologic connection between surface and groundwater, and protects senior water rights. A potential option is the establishment of a water market as exists in other Reclamation states, such as the system that presently exists in the South Platte River Basin in Colorado.

COMPACT HISTORY

During the late 1930s when Reclamation was initially investigating the water projects in the Basin, we recognized the first step to Federal water development was negotiation of a compact between Nebraska, Kansas, and Colorado allocating water between the states. This was needed to prevent conflict between the states and to insure long term project feasibility to protect the large Federal investment. Reclamation requested the states enter into negotiations to complete this necessary step. Reclamation stated in a 1940 Reconnaissance Report on the Basin (Project Investigation Report No. 41): "To avoid expensive litigation as a

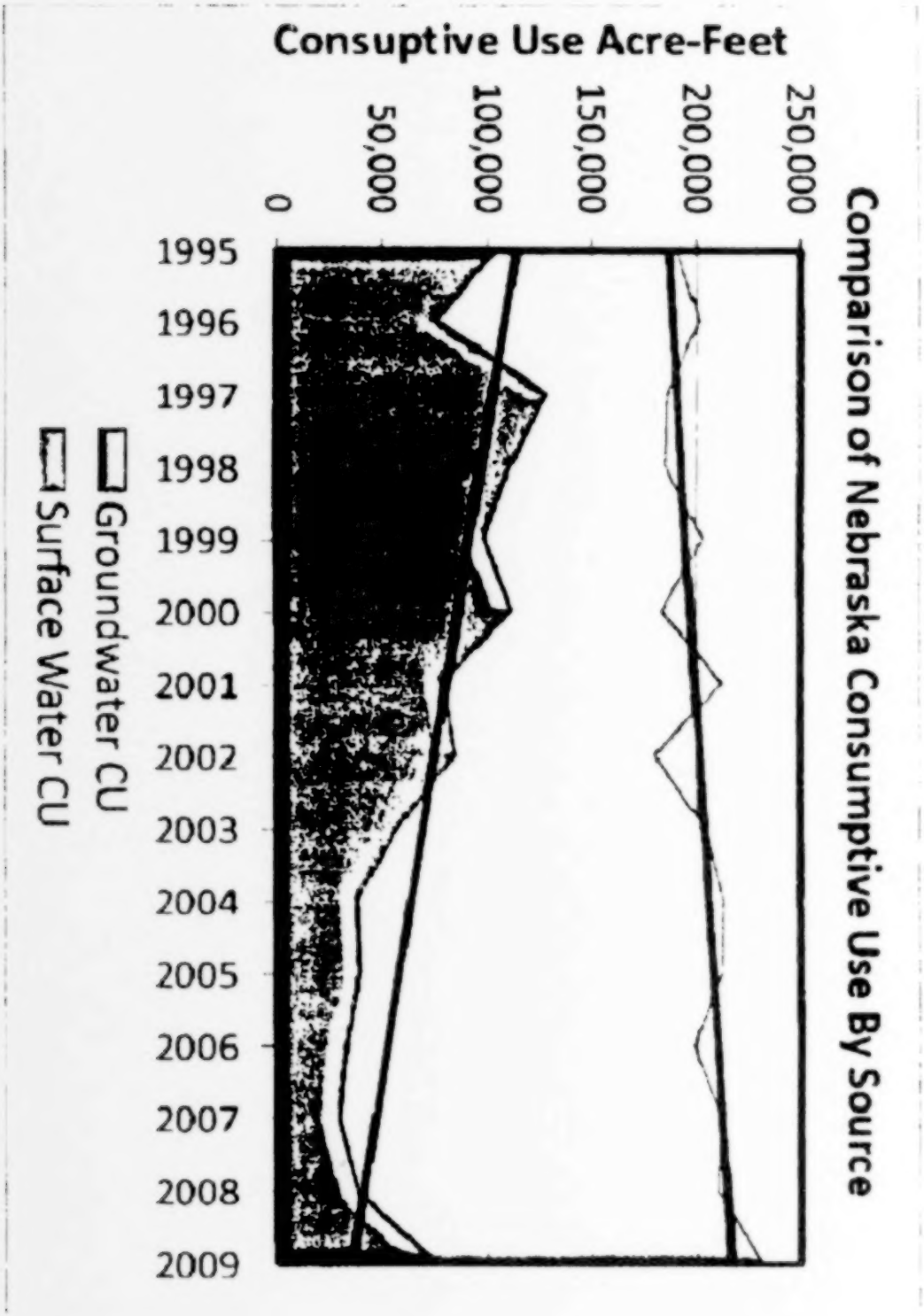
result of possible conflicting uses of water in the various states, further developments for irrigation should be preceded by a three-state compact or similar agreement on use of water." This report was one of many sources of information used by the three states to develop the Compact. Reclamation also assisted the states in the Compact negotiations by preparing hydrology analysis for the Basin and sharing Reclamation's preliminary water development plans with each of the states. The first attempt to adopt the Compact by the states was vetoed by President Roosevelt because the United States did not participate in the negotiations of the Compact. After participation by the United States, the Compact was renegotiated and revised to include Articles 10 and 11. The renegotiated Compact was signed by the states and the representative of the United States on December 31, 1942. Ratification of the Compact by the States and the U.S. Congress followed in 1943.

After the Compact was finalized, this water allocation became the framework for the final planning and design of a system of Federal reservoir and irrigation projects that would assist each of the states in developing their allocated share of the Republican River. Reclamation believed by acquiring necessary state water rights and designing its projects within each state's allocated share of the water, the water supply for these Federal projects would be protected against future water development. Between the late 1940s and 1960s eight Federal dams and reservoirs were constructed in the Basin. Reclamation entered into repayment or water service contracts with each

of its irrigation districts in the Basin to provide for repayment of the irrigation portion of construction and their associated operation, maintenance, and replacement (OM&R) costs for these projects. This was done with the expectation that the irrigation districts would be able to repay their share of the project costs, protecting the invested interest of the taxpayers of the United States.

COMPACT ACCOUNTING

From 2003 through 2006, Nebraska's allocation averaged 205,000 acre-feet and Nebraska's use averaged 250,000 acre-feet, each year resulting in computed beneficial consumptive use exceeding Nebraska's allocation. During this period Nebraska ground water pumping caused nearly 80% of the ground water depletions to the streamflows in the basin. The following graph shows Nebraska's ground water and surface water consumptive use since 1995. Statistical trend lines have been added to the graph to show how these consumptive uses have changed over time. Ground water consumptive use has gradually increased over time, while there has been a sharp decline in surface water consumptive use.


Comparison of Nebraska Consumptive Use By Source
Consuptive Use Acre-Feet
250,000
200,000
150,000
100,000
50,000
0
1995
1996
1997
1998
1999
2000
2001
2002
2003
2004
2005
2006
2007
2008
2009
Groundwater CU
Surface Water CU

Reclamation testified at each of the IMP hearings that surface water supplies in the Basin began to decline significantly in the late 1960s, right at the time ground water development in the Basin was expanding at a rapid rate. The use of surface water is not the reason Nebraska has failed to be in compliance with the Compact. Surface water use has decreased over time. Because of the current level of ground water use in the basin, ground water depletions have resulted in significant Compact compliance deficits for Nebraska. This draft IMP continues to allow for the unreasonable use of surface water supplies to make up for deficits caused by years of ground water overuse. In water-short years, surface water users experience significant water shortages because of imposed reductions in surface water supplies while ground water users have the capability to pump sufficient ground water to meet most of their irrigation demands. As a result, ground water depletions to surface flows have continued to gradually increase while surface water depletions continue to decline.

2009 ARBITRATION

Reclamation testified at the Republican River Compact Arbitration hearings in April 2009 and stated our concern that without additional limits and controls on ground water use, the surface water supplies in the Basin will continue to decline making it more difficult for Nebraska to meet Compact compliance in the long term. Reclamation concurs with Arbitrator

Dreher's decision that " Nebraska's current IMPs are inadequate to ensure compliance with the Compact during prolonged dry years" and "Nebraska and the NRDs should make further reductions in consumptive ground water withdrawals beyond what's required in the current IMPs." It is our position that ground water consumptive use must be reduced to a level that will allow base flows to recover to an extent that will allow Nebraska to consistently comply with the Compact in both the near term and long term. This is the only way Nebraska can meet the IMP goal of "sustaining a balance between water uses and water supplies " Likewise, Arbitrator Dreher noted in his Final Decision that "Nebraska's problem in complying with the Compact is groundwater CBCU, not surface water CBCU." As long as ground water depletions continue to increase, there will be less and less surface water supplies available to offset the deficits caused from ground water pumping.

CONCERNS AND EXPECTATIONS

Reclamation is very concerned about Nebraska's failure to meet Compact compliance since compliance accounting was reinitiated in 2003. Reclamation is even more concerned about the continuing depletion of inflows to Federal reservoirs. Federal projects were constructed based on the concept that project surface water rights would be protected. The trend of declining ground water levels will result in continuing stream flow depletions. This draft IMP fails to address impacts from past ground water use and future

ground water declines that will cause direct and substantial depletions in stream flows.

Reduced surface water supplies have caused Federal project water deliveries, throughout the Basin, to decline during the last 40 years. Ground water pumping in the URNRD directly affects the water supply for several canals associated with the Federal projects in the Basin. A decline of return flows from these canals has reduced supplies to downstream Federal projects as well. According to NE Stat. 46-715, the IMP should include clear goals and objectives with the purpose of sustaining the balance between water uses and water supplies for both the near term and the long term. Reclamation is very concerned with this balance in the Basin as it relates to surface water supplies for existing surface water uses.

Reclamation expects the water rights associated with the authorized Federal multipurpose projects in the Basin be protected by the State of Nebraska and the NRDs. Reclamation expects to continue to operate the Federal projects for their authorized purposes. Reducing ground water depletions is the only way to gradually allow the streamflows to recover, provide equity among water users, and assist Nebraska in achieving long term Compact compliance.

SPECIFIC COMMENTS

1. Goal 4 – "protect ground water and surface water users from stream flow depletions caused by surface water or ground water uses begun after

the date the river basin was designated as fully appropriated". This goal is not being met and will not be met by the proposed IMP. Records indicate depletions from ground water have increased since 2004 and ground water levels are continuing to decline.

2. Goal 5 – "reserve any streamflow available from regulation, incentive programs, and purchased or leased surface water required to maintain compact compliance from any use that would negate the benefit of such regulations or programs " Since any water that appears as streamflow is subject to storage and surface water use in accordance with Nebraska state statues, how does the state intend to meet this goal?

3. The IMP requires a 20% reduction in pumping to a level no greater than 425,000 acre-feet but then allows higher pumping above 425,000 acre-feet in years with lower than average precipitation. Years with below average precipitation are also "water short" years. Allowing higher pumping levels in these years works against compliance and equity between surface water users and ground water users.

4. The URNRD's current pumping volumes are near a 20% reduction from the '98-'02 baseline volumes discussed in the IMP. The '98-'02 baseline is not representative of average pumping as this was a dry period when pumping rates were high. Reductions need to be higher to improve surface water supplies and achieve long-term compliance. Reducing allocations by more than 20% will provide a cushion to offset deficits in dry or water

short years. This would reduce the need for other users to unfairly make up the deficit.

5. The proposed IMP does not address improving long-term surface water flows nor make up existing deficits. Improved surface water flows will be needed to achieve long-term compliance.

6. The Surface Water Controls as described in section VII.F are vague and do not describe the intent of "Compact Call."

7. The "Compact Call Year" is not defined in the draft IMP. Also a number of the terms under the Compact Call Year evaluation are not clear.

8. The IMP indicates that a "Compact Call" will be placed on the river at Guide Rock or Hardy on all natural flow and storage permits. This call would appear to prevent storing water in Harlan County Lake decreasing the water supply for the Bostwick Division. This call would also appear to prevent the diversion of natural flow into the Courtland Canal. Is this the intent of the Compact Call? This could also increase the number of years that are designated as "water-short years" under the terms of the Final Settlement Stipulation (FSS).

9. Closing all natural flow rights and storage rights while not curtailing all ground water wells hydrologically connected to the streams (as defined by the FSS) is discriminatory and does not provide equity between water users (a primary goal of the IMP).

10. The IMP states that a "Compact Call" is on until such time that administration is no longer

needed. The IMP is unclear whether any ground water use will occur in the Rapid Response Area during a "Compact Call Year" Wili ground water use remain off during the entire year when a "Compact Call" has been placed?

11. The IMP does not define "allowable surface water depletions." A better understanding of the surface water user's share of allowable depletions is needed. Surface water supplies are already reduced during "water short" years. Ground water consumptive use has remained the same or increased and, under the IMP a higher volume of ground water pumping is allowed in years with below average precipitation. This is completely contrary to providing equity between surface water uses and ground water users.

CONCLUSION

Reclamation is supportive with Nebraska's effort to comply with the Compact. However, a plan that essentially curtails all surface water use and continues to allow ground water use and ground water mining to occur in the Basin is unreasonable and not acceptable. This is not consistent with Nebraska Statute 46-715 as surface water users are not being provided equal protection among all water users. Reclamation views our Federal water rights as property rights that must be provided equal protection. The fiscal investment of the taxpayers of the United States must also be protected. In doing so, the IMPs should not ignore the physical reality that ground water and surface water are hydrologically connected

and the administration of the water supply in the basin should be consistent and equitable for all water users.

Additionally, the proposed revisions to the IMP do not allow Reclamation to operate as authorized by the U.S. Congress. If adopted, this IMP would prevent Reclamation from performing its contractual obligations of delivering water to irrigation districts in "Compact Call" years. Federal projects were specifically designed to be in compliance with the Compact and our use has not increased over time but decreased as a result of uncontrolled depletions upstream of our reservoirs. Inadequate water supplies, because of depleted stream flows in the URNRD, adversely affect surface irrigators who were planning on supplies expected after the signing of the Compact. Depleted surface water deliveries directly and substantially reduce the economic benefits provided by the Federal projects.

Reclamation needs a better understanding on how the surface water controls of this proposed IMP will work. If the state recognizes the administration of water in the basin for Compact compliance as a "beneficial use" then the senior water right holders in the basin should be compensated. Bypassing inflows from upstream reservoirs to store water in Harlan County Lake is, in our view, a "selective call." Two of Reclamation's reservoirs upstream are senior to Harlan County Lake and the other reservoirs have an equal water right priority to that of Harlan County Lake. Additionally, if **all** natural flow permits are

closed, as indicated in the proposed IMP, what authority will be used to supply water to the Courtland Canal and Lovewell Reservoir during "Compact Call" years? If the water cannot be stored or diverted as indicated in this IMP, then the water flowing through our reservoirs is no longer project water. Reclamation does not currently have authority to transfer non-project water through Courtland Canal for a non-project use. Finally, Reclamation is concerned that "Compact Call" years could result in surface water users losing irrigation supplies for multiple years as the reservoirs ability to store water is reduced. The financial viability of our irrigation districts, which supplies water to approximately 700 users in Nebraska, would be in jeopardy if this would occur. This is unreasonable. Other impacts coupled with reduced reservoir levels will occur to recreational and fish and wildlife benefits associated with these projects. It is our understanding that DNR predicts surface water users will be curtailed 2 out of 10 years.

Please provide us with the modeling and supporting data showing the frequency that surface water curtailments will occur.

As an alternative, Reclamation believes the water supplies of the basin should be managed fairly across the basin for all water users. A long term conjunctive management approach should be developed that allocates consumptive use in an equitable manner across the basin. This approach would allow water to be marketed between all users based on consumptive use. Surface water should be provided with an

equitable share of Nebraska's consumptive use during "water short" years. We again want to stress that the earliest water rights in the basin are the surface water rights that are currently not being provided "equity among water users" and if this IMP is adopted, will not be in the future. Sustained surface water supplies are critical for project viability and Nebraska's ability to be in compliance in the long term.

In conclusion, Reclamation is willing to continue working with all the NRDs, Irrigation Districts, and State as they seek compliance with the Compact. The IMP should recognize and protect the investment of the United States' taxpayers made decades ago. To ensure compliance in the long term. Reclamation believes there must be a healthy surface water component in the Basin. To accomplish this, we believe reduction in ground water pumping must be significantly more than currently provided in the IMP to allow base flows to begin to recover. Ground water pumping and other upstream uses are progressively depleting reservoir inflow.

Reclamation is hopeful as you finalize the IMP that you will study the presented testimony and respond to our specific questions and concerns we have presented in this statement.

/s/ Aaron M. Thompson
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Area Manager